elections. The candidates could use the time as they choose (subject to any format conditions imposed by the mandate), but the obvious purpose would be to allow them to discuss their candidacy, not simply to provide an opportunity to expound on general matters of public interest. All candidates in contested elections -- not simply government-favored candidates – presumably would be entitled to the subsidized time, but that time would be allotted to them because of their political viewpoints, and as a means of enabling them to convey their message in their own words. The interest in ensuring that specific individuals are given time to communicate their partisan political views would thus be directly tied to the content of what the speakers would likely say. Such content regulation of speech would be subject to strict First Amendment scrutiny. See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1991) (requirement that proceeds of book by criminal about crimes be given to victims is content-based regulation of speech subject to strict scrutiny); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (tax applied to general interest magazines but exempting religious, professional, trade and sports journals is content-based regulation of speech subject to strict scrutiny); Buckley v. Valeo, 424 U.S. 1 (1976) (limits on campaign contributions and expenditures are regulation of speech subject to strict scrutiny).[8]

[8] Even if a "free air time" rule were, improbably, not considered to dictate the content of speech, it still would have to survive exacting First Amendment scrutiny. A content-neutral restriction that imposes only an incidental burden on speech can only be justified if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." U.S. v. O'Brien, 391 U.S. 367, 377 (1968); accord, e.g., Turner I, 512 U.S. at 602 (1994). To satisfy this standard, the restrictions must not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). As discussed below, the government could not satisfy even this "intermediate scrutiny."

2. Requiring Broadcasters to Provide Free Time Impermissibly Would Infringe First Amendment Freedoms.

To withstand a First Amendment challenge, the government must prove that requiring broadcasters to provide free broadcast time to political candidates would directly advance a compelling governmental interest and be as precisely tailored as possible to achieve that interest. E.g., Boos v. Barry, 485 U.S. at 321-22. No doubt, the integrity and credibility of the federal electoral process is, as a matter of broad public policy, a compelling state interest. See Buckley v. Valeo, 424 U.S. at 27. Mandating free and subsidized broadcast time, however, would not directly advance, nor would it be narrowly tailored to achieve, that interest.

Free time proposals are aimed to enhance the integrity and credibility of the electoral process by reducing one part of the campaign spending budgets of political candidates. However, the government would likely find it impossible to meet its heavy burden of proving in court that a reduction in the cost of one element of campaigning would have any positive impact on the integrity of the political process. The Supreme Court already has held that "the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns." Buckley v. Valeo, 424 U.S. at 57. Candidates are just as likely to be or appear to be beholden to special interests, with or without shifting some of their campaign costs to the broadcast media. Encouraging reduced spending through free broadcast time, moreover, might actually undermine public confidence in the political process by instead *increasing* the

total amount of broadcast advertising – and just as likely as not encouraging more political advertisements which are negative and uninformative, eliciting public disgust, rather than confidence, in the political system. Certainly, there could be no constitutional limit on the *content* of such necessarily "wide open and robust" advertising – whether free or paid. Thus the constitutionally required nexus between free broadcast time and government's interest in enhancing the integrity of the electoral process is either nonexistent or, at best, murky.

Even if reduced campaign spending *could* bring some measure of integrity to the political process, the proposal nevertheless would fail to survive strict scrutiny through its utter lack of tailoring to the government's asserted interest. Even a compelling governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Wooley v. Maynard, 430 U.S. 705, 716-17 (1977) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). Numerous means exist for pursuing the goal of enhancing the integrity of the political process that are far less drastic than requiring broadcasters to finance candidates' political campaigns.

Most obviously, "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." Buckley v. Valeo, 424 U.S. at 57 n.65. "This procedure would communicate the desired information to the public without burdening a

speaker with unwanted speech . . . ." Riley, 487 U.S. at 800. That Congress may have political objections to such an alternative does not render constitutionally palatable the "free air time" effort to make broadcasters shoulder the financial burden of campaign finance reform.[9]

In short, Congress cannot compel broadcasters to finance political campaigns as long as means exist to enhance the integrity of the political process that do not burden free speech rights. The "free air time" proposal would force broadcasters to make contributions of advertising, services and broadcast facilities to candidates they might not otherwise choose to support, all in violation of the First Amendment protected right not to engage in government-mandated speech. See Riley, 487 U.S. at 800; Buckley v. Valeo, 424 U.S. 1; see also Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (Brennan, J., concurring) (discussing First Amendment issues relating to forced political contributions).[10]

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[9] In addition, Congress could enact more stringent limits on contributions to political campaigns. The Supreme Court has upheld the constitutionality of limits on political contributions. Buckley v. Valeo, 424 U.S. at 58. Additional limits could include, for example, more restrictions on campaign contributions from political action committees and on so-called "soft" money contributed to political parties that is used to finance individual campaigns. Congress could also seek to work with the states to explore means of reducing the need for candidates to expend substantial funds, for example by limiting primaries and enhancing the coordination and timing of primaries and elections.

[10] Professor Smolla also suggests that Austin "actually explored the question of whether the press can be swept in and made part of the regime of political campaign reform. The case involved a Michigan law restricting corporate political expenditures. The law contained an exemption, however, for media corporations. The Supreme Court not only held that the exemption was permissible, but seemed to signal that the law would *not* have been upheld *had* it been applied to the press. The Court emphasized the 'unique role' the press plays in our system, stating that the 'press serves and was designed to serve as a powerful antidote to any abuses of power by government officials." Smolla, supra, at 6.

B. The Nature of Broadcasting Does Not Lessen the Government's Burden of Proof.

Sponsors of 'free air time" are fond of supporting their concept not only by citation to Red Lion, as discussed below, but also to the Supreme Court's decision in CBS v. FCC, 453 U.S. 367 (1981). The Court in that case concluded that the statutory right of federal political candidates to "reasonable access" to broadcast time "properly balances the First Amendment rights of federal candidates, the public, and broadcasters." Id. at 397. Presumably, sponsors of "free air time" believe that such a compulsion might well survive First Amendment challenge on the same grounds. The Court's decision in CBS, however, fails to support that proposition.

1. "Reasonable Access" Would Not Include Requiring Broadcasters to Finance Political Speech.

At least historically, the Supreme Court "has required some adjustment in First Amendment analysis" for broadcasters because "given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public" interest. FCC v. League of Women Voters, 468 U.S. 364, 377 (1984). At the same time, the Court has "made clear that broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory authority in this area." Id. at 378. Congressional restrictions on broadcasters' editorial judgment and control at a minimum "have been upheld only when [the Court was] satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues." Id. at 380. Also see CBS v. Democratic National

Committee, 412 U.S. 94, 116 (1973) (Congress structured broadcast regulation to maintain the broadcasters' journalistic role).

As set forth below in discussing Red Lion, the 1969 rationale for applying the lowest standard of First Amendment scrutiny to broadcast regulation cannot survive careful analysis today. Even assuming that "free air time" need satisfy only "intermediate scrutiny," it could not withstand even that mid-level judicial review. As demonstrated above, compelling broadcasters to sponsor candidates' partisan political speech is unlikely to enhance the integrity of the electoral process, regardless of whether that interest is considered compelling or substantial. Nor is such a compelled speech requirement either narrowly or precisely tailored to further that interest in light of the availability of the numerous alternatives that impose less of a burden on protected speech. See FCC v. League of Women Voters, supra, at 397-98 (restriction not narrowly tailored in light of the "variety of regulatory means that intrude far less drastically upon the 'journalistic freedom' of . . . broadcasters") (quoting CBS v. Democratic Nat'l Committee, supra).

Indeed, the decision in CBS v. FCC is consistent with this analysis. The Court in that case did not approve a broad right of access to the media, but upheld "a limited right to 'reasonable' access" under section 312(a)(7). 453 U.S. at 396 (emphasis in original). The Court reached its decision only after recognizing that "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties]'" and that government restrictions on the editorial

discretion of broadcasters "'call for a delicate balancing of competing interests.'" Id. at 394-95 (quoting CBS v. Democratic Nat'l Committee, 412 U.S. at 110, 117). The "reasonable access" requirement upheld by the Court was expressly limited to political candidates "for paid political broadcasts on behalf of their candidacies." Id. at 382 (emphasis added). "No request for access must be honored under § 312(a)(7) unless the candidate is willing to pay for the time sought." Id. at 382 n.8.

A requirement entitling political candidates to free broadcast time goes far beyond "reasonable access" and would upset the "delicate balance" the Court reached in CBS v. FCC. The Court found that a limited right of political candidates to "reasonable access" "represents an effort by Congress to assure that an important resource -- the airwaves -- will be used in the public interest," 453 U.S. at 397, and concluded that the public interest was served by affording political candidates an opportunity to "present, and the public to receive, information necessary for the effective operation of the democratic process." Id. at 396. That public interest does not, however, include forcing broadcasters to subsidize the cost of broadcasting political candidates' self-selected information. [11]

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[11] There is only a tenuous connection between the FCC's admitted power to regulate the *context* of broadcasting,. and its dubious power to issue a mandate designed to cure the perceived ills of America's campaign finance process. As Professor Smolla comments at p. 3 of his article "Free Air Time for Candidates and the First Amendment,"

> indeed there is absolutely no logical nexus between digital broadcasting and political campaigns. There is nothing about changing the technical method of broadcasting that has anything whatsoever to do with the content of what is broadcasted, let alone content defined specifically as "speeches by candidates."

Indeed, the lack of nexus between the purported goals of the "free air time" concept and the FCC's regulatory power also exacerbates the First Amendment vulnerability of any attempt by the FCC to impose such a regime.

Broadcasters add substantial value to the licenses they receive from the federal government through investments in programming, operations, and equipment. The broadcasters are compensated for this investment through the sale of broadcast time to advertisers. The rates charged for this time vary according to the time of day and the program during, before, or after which the advertisement is broadcast. A "free air time" rule would mandate not only that political candidates be given the opportunity to have their messages broadcast but presumably that the broadcasts occur when broadcast time is most valuable (so-called "prime time"). Such a requirement would be a far more expansive encroachment on broadcasters' editorial discretion than the paid "reasonable access" upheld in CBS v. FCC, and would represent nothing less than a tax on broadcasters to finance partisan political campaigns -- an issue never considered, much less decided, in that case.[12]

A "free air time" mandate would skew the "delicate balance" of competing interests entirely in favor of political candidates. Whether or not the public would gain any benefit from having broadcasters, rather than the candidates themselves, finance a substantial portion of partisan political messages, the broadcasters' ability to control the content of their broadcasts and refrain from supporting speech with which they do not

[12] Alternatively, compelled financing could be interpreted as a license fee. The tying of mandated or discounted broadcast requirements to the licensing of frequencies, however, is inconsistent with the Court's admonition that government may not, consistent with the First Amendment, condition the grant of a government benefit on the sacrifice of a constitutional freedom. Rutan v. Republican Party, 497 U.S. 62 (1990); Speiser v. Randall, 357 U.S. 513 (1958). Broadcasters do not lose their First Amendment freedoms merely because the FCC grants the licenses under which they operate. See FCC v. League of Women Voters, 468 U.S. at 376-81. Such a construction of the pending legislation also raises takings concerns, discussed infra at p. 21ff. Also see Professor BeVier's discussion of the inapplicability of Rust v. Sullivan, 500 U.S. 173 (1991), in Exhibit A, at pp. 50-51.

agree would be severely infringed. Under these circumstances, the pending legislation plainly would violate the freedom of speech and press guaranteed by the First Amendment.

2. The Lingering Death of Red Lion[13]: "Scarcity" No Longer Justifies Treating Broadcasters Differently Than Other Media Entities.

As discussed above, "free air time" would fail to satisfy either strict or intermediate First Amendment scrutiny. As for the even lower level of scrutiny applied to restrictions on broadcasters' speech by Red Lion, the legitimacy of relying on spectrum scarcity as the basis for according broadcasters less freedom than other media rapidly eroded after 1969 and has subsequently disappeared. The spectrum scarcity rationale for such disparate treatment has come under increasing judicial attack, and the apparent scarcity that formed the factual predicate of Red Lion is now "history". In all likelihood, therefore, "free air time" would be subjected to the strict judicial scrutiny applied to infringements of the editorial freedoms granted to all media by the First Amendment.

The Supreme Court in Red Lion relied on the scarcity concept to justify regulation of broadcast licensees in the public interest and the "paramount" right of the public "to have the medium function consistently with the ends and purposes of the First Amendment." 395 U.S. at 389. Such scarcity was equivalent to scarcity of outlets for diverse viewpoints because broadcast licensees were virtually the only form of electronic

[13] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

mass media for almost the first 50 years after Federal regulation was legislated by Congress. The continuing and exponential expansion of available spectrum, spectrum compression, and the advent of cable television, satellite transmission, and, most dramatically, the Internet have, however, vastly increased the number and availability of electronic mass media outlets and have erased any scarcity of sources for expression of diverse viewpoints. Indeed, confident citation of Red Lion as a First Amendment cure-all rationale for the free time mandate would be the triumph of hope over careful constitutional analysis.

There is little question that the avoidance of frequency interference and other spectrum problems is a sufficient reason for government regulation of broadcast frequencies. Licensing for those purposes is not inherently unconstitutional, nor does the First Amendment necessarily prevent content-neutral mechanisms serving goals like local and universal service. See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). But "spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory." Syracuse Peace Council v. F.C.C., 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr J., concurring), cert. denied, 493 U.S. 1019 (1990).

Regulation and licensing with the goal of picking qualified licensees is fundamentally distinct from a "free air time" mandate that would force publication and subsidization of a particular kind of speech because of its content. The former allows review of a licensee's performance to measure good faith and reasonable efforts to

respond to community interest and to satisfy minimum performance criteria in the public interest. The latter would compel speech and require broadcasters to subsidize a particular kind of speech during a license term. The former comports with the requirement of minimum intrusion commensurate with the necessity of licensing. The latter founders because such political speech and can and will be heard over an extraordinary range of media and from an almost infinite variety of voices without such a mandate, and because the mandate would simply not be conceptually related to evaluation of licensees to serve the public interest.

Accordingly, courts increasingly have criticized the use of presumed scarcity of media for mass distribution of video and audio information as a means of justifying content regulation. See, e.g., Turner I, 512 U.S. 622, at 637-8 (1994) (impliedly questioning the validity of disparate treatment for broadcasters and stressing the limitations of government control of content, even under Red Lion); Telecommunications Research and Action Center v. F.C.C., 801 F.2d 501 (D.C. Cir. 1986) ("The basic difficulty in this entire area is that the line drawn between print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. . . . Since scarcity is a universal fact, it hardly explains regulation in one context and not another."). The FCC in partial response abolished the Fairness Doctrine which gave rise to the Court's decision in Red Lion. See Syracuse Peace Council, supra (affirming Meredith, 2 F.C.C. Rec. 5043 (1987), recon. denied, 3 F.C.C. Rec. 2035 (1988), aff'd sub nom. Syracuse Peace Council, cited supra).

Thus, the traditional and undifferentiated claim that spectrum scarcity justified regulation has lost its intellectual vitality, and there has been a growing recognition that the need for government allocation and licensing to avoid interference, even under historical conditions of scarcity, cannot support governmental favoritism for particular speech or speakers based on the content of messages. *See* Time Warner Entertainment Co. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*) ("... Red Lion has been the subject of intense criticism. Partly this rests on the perception that the 'scarcity' rationale never made sense – in either its generic form (the idea that an excess demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare) and partly the criticism rests on the growing number of available broadcast channels."); Tribune Co. v. FCC, NO. 97-1228 (D.C. Cir. Jan. 16, 1998) ("It may be that ... the FCC would be thought arbitrary and capricious if it refused to reconsider its [newspaper-broadcast cross-ownership] rule in light of persuasive evidence that the scarcity doctrine is no longer tenable."). Also, in Turner I, the Supreme Court declined to extend Red Lion to cable, stating that "whatever its validity in the cases elaborating it," the scarcity doctrine could not apply outside the broadcast context. 512 U.S. 622 at 637-8. Although the Court recognized that "courts and commentators have criticized the scarcity rationale since its inception," it saw no reason to consider those arguments in a case that involved only cable regulation. Id. at 2456-57.

Also, as set forth above, even if the scarcity doctrine under Red Lion retains some slim claim to validity – almost entirely because the Supreme Court has not specifically

overruled the decision -- the argument that Red Lion would support the imposition of "free air time" is unjustified and based on an incorrect understanding of the case, which, as set forth above, dealt solely with the question of whether, in the absence of government's "fairness" requirement, the views of some speakers might not be reflected on broadcast stations. Indeed, given the narrow holding of Red Lion, one can wonder whether those who ritually intone "Red Lion" in this context have recently read the decision. No one can argue that the views of candidates for political office are not widely available on broadcast licensees now, both through news and other free coverage and through the sale of advertising time, let alone on the multifarious and even cacophonous alternate means of electronic distribution available in this country. Thus, the free time proposal is fundamentally unrelated to any claimed scarcity of electronic voices, cannot rely on the narrow "fairness doctrine" holding of Red Lion for constitutional support, and would have to be considered, as analyzed above, under the traditional First Amendment standards applying to all media.

3. Other First Amendment Theories Do Not Support a "Free Air Time" Mandate

Proponents of "free air time" have suggested two other theories in an attempt to bolster their First Amendment arguments. Respectively, they are discussed in detail by Professor Rodney A. Smolla in his discussion of "Free Air Time," supra, and by Professor Burt Neuborne in "Blues for the Left Hand: A Critique of Cass Sunstein's *Democracy and the Problem of Free Speech*," 62 Univ. Chicago L. Rev. 423 (1995), a

copy of which is attached to this Summary as Exhibit B. Briefly, the two arguments are as follows:

(1) "*Quid pro quo*": As Professor Smolla puts it, the argument is that "free air time may be imposed on broadcasters as a *quid pro quo* exchange for the grant to broadcasters of additional spectrum space for digital television." Smolla at 1. He analyzes and refutes each of the asserted bases for the *quid pro quo* theory, including but not limited to his final conclusion that "the government cannot presume to attach conditions to benefits that are not in fact benefits. It is not at all clear that the grant of additional spectrum space was a 'benefit' to broadcasters *at all*. The conversion to digital broadcasting, it now appears, will probably cost broadcasters more than they are likely to recoup. There is no *quid* to the *quid pro quo*." Id. at 3.

(2) The *Madisonian theory of the First Amendment*. At p. 435 of Professor Neuborne's attached critique of Professor Sunstein's text, he notes:

> According to Sunstein on Madison, the First Amendment's dominant purpose is the [government's] protection of political speech that is needed for the proper functioning of a polity of political equals seeking a common good – what Sunstein calls a "deliberative democracy."

Professor Neuborne's analysis demonstrates that the so-called Madisonian theory for flipping the First Amendment to support government *regulation* of speech is deeply antithetical to fundamental First Amendment principles, and without support in decisions of the Supreme Court – except for Red Lion. The Madisonian theory is inconsistent with any "plain meaning" interpretation of the First Amendment as consistently applied by the

Supreme Court. Particularly if bereft of Red Lion as a viable citation, a likelihood discussed above, the theory doesn't make much constitutional sense and the government's purported right to dictate favored speech could not be limited to free political time, but would inevitably extend to whatever topic the government of the moment supported.

II. A "FREE AIR TIME" REQUIREMENT WOULD TAKE BROADCASTERS' PROPERTY WITHOUT JUST COMPENSATION, VIOLATING THE FIFTH AMENDMENT

The Fifth Amendment bars the government from taking private property without compensation. Proponents of "free air time" argue that requiring broadcasters to air candidate messages for free would not constitute a taking because the Communications Act bars licensees from claiming any property interest in their licenses. This simplistic analysis simply does not fairly represent the scope of broadcasters' ownership interests. While they may have no legal claim against the government for the spectrum as such, broadcasters certainly have a cognizable interest in the businesses they have developed using that spectrum, an interest that cannot be eradicated by government fiat. Further, the courts have recognized that takings occur when government requires uses of property different from the expectations of property holders or which substantially diminish their value. See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Penn Central Transportation Corp. v. New York City, 438 U.S. 104 (1978).

Although a specific free time proposal has not yet been presented to the Advisory Committee, some free time proposals would grant up to two hours of free time on every

television station to each qualified candidate for public office. Even if the rule were limited to federal candidates, in some markets there would be more than 100 qualifying candidates in a given election cycle. Broadcasters could be required to give candidates up to 1020 30-second spots per week, of which half could be in evening hours. Each evening, every TV station might have to give up 73 spots. In the weeks before elections, there would be little, if any, remaining time that broadcasters could sell to commercial advertisers. Thus, even if the actual mandate were only half as onerous, broadcasters' expectations concerning the use of their stations still would be markedly changed, with potentially devastating impact on stations' incomes and market values.

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." This guarantee is designed to "'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Penn Central Transportation Co. v. New York, 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 49 (1960)). Any governmental action that effects even a minor taking of property rights brings into question the constitutional obligation to pay just compensation, as measured by market value at the time of the taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); United States v. Fifty Acres of Land, 469 U.S. 24, 29 (1984). Just compensation must be paid whether the intrusion is comparable to an easement, Nollan v. California Coastal Commission, 483 U.S. 825, 831-32 (1987), or more permanent, as in Loretto, and regardless of the degree of economic impact or the public interest asserted.

A "free air time" mandate would implicate at least two property rights: (1) the broadcasters' rights in station facilities and work of station personnel; and (2) the value of broadcast time that results from the investment of capital and effort to create and maintain an ongoing broadcast station where there would otherwise be only a bare frequency allocation.[14] A frequency allocation cannot be used until the licensee constructs facilities capable of sending communications using the frequency and hires personnel to operate its facilities. Even then, communication requires an audience, which the licensee develops through investment in programming, including coverage of news, public events, sports, and various entertainment programming.

Under the ostensibly "free" broadcast license scheme long ago established by Congress, the licensee recovers the cost of its facilities, personnel, and programming

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[14] It is sometimes argued that broadcasters have no property rights in their licenses because they are granted by the government only for a specified term and may be altered during their term to avoid interference problems. See generally, FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940). This argument, however, disregards the fact that there is a legitimate renewal expectancy, and that there must be truly compelling cause for revocation of the license during its term. As Professor BeVier points out, Exhibit A at 55:

> In Fifth Amendment terms, the [free air time proposal] push[es] the government ownership claim to the breaking point. On the most rudimentary functional economic analysis of how the licensing system actually works and is administered, the free TV mandates would constitute a taking of property. By requiring that broadcasters forego substantial income from the sale of broadcast time during the license period, whereby assessing broadcasters a "fee" derived solely from their sales of political ads and devoting it solely to funding candidate time, each of the free TV proposals not only would constitute an obviously coercive wealth transfer but would also unacceptably disrupt the broadcasters' legitimate, government-induced, investment-backed expectations.

Of course, as Professor BeVier concedes, the "jurisprudence that the [Supreme] Court has developed in considering those [takings] claims is a paradox of doctrinal unintelligibility." Id. at 14. She concludes, however, that "the Fifth Amendment, on the other hand, is designed to prevent unfair and unjust coercive wealth transfers disguised as regulation. The only way that the Court can accomplish that purpose is to hold that a regulation is a taking for which compensation must be paid. Thus, if a significant defect of the free TV mandates is that they coercively transfer wealth from broadcasters to political candidates, then Fifth Amendment principles would be at stake." Id. at 16.

through agreements to broadcast advertisers' messages at specified times during the day that the broadcaster has devoted for such purposes. The rates for this advertising depend on the length of the message, the time of day the advertiser chooses to have its message broadcast and the programming during, before, or after which the advertisement airs. By requiring that broadcasters air political candidates' advertisements -- rather than other advertisers' messages -- without charge, the pending legislation would take broadcasters' property without just compensation.[15]

CONCLUSION

A "free air time" mandate would be an attempt to advance the laudable goal of campaign finance reform, but its means of achieving that goal would raise insuperable constitutional barriers. Neither Congress nor the FCC can compel anyone, including licensed broadcasters, to finance federal candidates' partisan political speech. The proposals to extend that mandate to provide free access to broadcast time to such candidates not only would disrupt the "delicate balance" of existing law but would raise additional constitutional difficulties, further erode broadcasters' journalistic freedom, and render the "reasonable access" mandate even more susceptible to challenge. Those who take comfort from early judicial decisions sustaining regulation of broadcasters should realize that those decisions at a minimum do not support the proposed legislation and

[15] Without question, a taking would occur if Congress were simply to mandate that an expressive enterprise reserve a portion of its medium of expression for use by the general public. "Such public access would deprive [the media] of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994). "Free air time" represents just such a mandate to broadcasters. Broadcasters would be unable to exclude political candidates' messages from their programming, and they would not receive compensation for that access. These circumstances would pose a clear violation of the Fifth Amendment.

likely would no longer represent the Supreme Court's view on the permissibility of treating broadcasters differently than other media—and certainly not in the context of compelled political speech.